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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SERVICE BUSINESS FORMS INDUSTRIES, INC. AND
SERVICE COMPUTER FORMS INDUSTRIES, INC.
Petitioners,

v.

ROBERT I. GREENBERG, ROSE GREENBERG, AND
MAYNARD GREENBERG, AS CO-TRUSTEES OF THE MAL GREENBERG
TESTAMENTARY TRUST
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November 15, 1989

QUESTIONS PRESENTED FOR REVIEW

Did the trial court err in ruling as a matter of law, and contrary to Okla. Stat. tit. 12A § 1-208 (1981), that there is no duty of good faith with regard to the acceleration of promissory notes after technical default?

Petitioner prays for review and reversal of this ruling. This ruling is directly at odds with fundamental contract law recognizing that the duty of good faith is inherent in every contract. Moreover, this ruling is contradictory to Oklahoma's statute, Okla. Stat. tit. 12A § 1-208 (1981), which expressly imposes a duty of good faith with respect to acceleration clauses. If allowed to stand, the lower court's decision will create dangerous precedent which may have far-reaching adverse consequences in commercial transactions.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, Service Business Forms Industries, Inc. and Service Computer Forms Industries, Inc., respectfully seek a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Tenth Circuit, which was entered and filed on August 17, 1989.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Oklahoma has not been reported. The Journal Entry of the District Court's judgment is reprinted as Appendix A beginning at Page A-1. The opinion of the Court of Appeals for the Tenth Circuit has been reported. It is reprinted as Appendix B beginning at Page B-1.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered and filed in the United States Court of Appeals for the Tenth Circuit on August 17, 1989. This Court has jurisdiction under the United States Judicial Code, 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Okla. Stat. tit. 12A § 1-208 (1981) provides in relevant part:

> A term providing that one party . . . may accelerate payment . . . 'at will' or 'when he deems himself insecure' or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired.

STATEMENT OF THE CASE

This action involves a dispute between the holder of a promissory note and the maker thereof. (The promissory note is reprinted as Appendix E at Page E-1. It is referred to as the "promissory note" hereinafter). Robert I. Greenberg, Rose Greenberg and Maynard Greenberg as Trustees of the Mal Greenberg Testamentary Trust ("Plaintiffs") filed suit against Service Computer Forms Industries, Inc. ("Service Computer") and Service Business Forms Industries, Inc. ("Service Business") to collect the accelerated amount of unpaid principal and interest allegedly due to the Plaintiffs according to the promissory note. (Appendix B at Page B-4). Service Business is owned by Laurance B. Wolfberg and Carolyn Wolfberg. Carolyn Wolfberg is the sister of Plaintiff Robert I. Greenberg. (Appendix B at Page B-2).

Among the defenses raised by Service Business in response to the Plaintiffs' attempt to accelerate and collect the entire unpaid amount of the promissory note were the following:

(1) Plaintiffs had failed to accelerate the promissory note in good faith and thereby failed to satisfy the statutory test imposed by Okla. stat. tit. 12A § 1-208 (1981). (See the Pretrial Order attached as Appendix C at Page C-9);

(2) Plaintiffs had waived their right to accelerate or were estopped to accelerate the terms of the promissory note by their past course of conduct in accepting late payments. (Appendix C at Page C-10); and

(3) A failure of consideration had occurred thereby depriving Petitioners of the benefit of their bargain. (Appendix C at Page C-10).

Additionally, Service Computer and Service Business counterclaimed against the Plaintiffs asserting that on or about the time the promissory note was entered into, Robert I. Greenberg, in either his personal capacity or his capacity as co-trustee of the Mal Greenberg Testamentary Trust, agreed to execute a disclaimer whereby he would disclaim any benefit that he may receive from the Trust as a result of Petitioners' payment on the promissory note. (Appendix B at Page B-4). For clarification purposes it should be pointed out that Greenberg was a 50% beneficiary under the Trust and Carolyn Wolfberg was a 50% beneficiary under the Trust. If Greenberg would have executed the disclaimer as the Petitioners contend he was obligated to so do, Carolyn Wolfberg

would have been the sole beneficiary of the Trust's receipt of the Petitioners' payment on the promissory note.

Greenberg did not deliver the disclaimer as Petitioners alleged he was obligated to do. Service Business prayed for judgment against the Plaintiffs for either (a) specific performance of the disclaimer, or (b) an injunction prohibiting Plaintiffs from enforcing the promissory note. (Appendix C at Page C-8).

On March 14, 1988, the trial court entered its summary judgment order in favor of the Plaintiffs by ruling that the Plaintiffs, as holders of an installment promissory note, had an unqualified right to accelerate the indebtedness owing thereunder, regardless of their good faith. (Appendix B at Page B-6). Consequently, all but one of Service Business's affirmative defenses were stricken from the pretrial order.[1] Only the affirmative defense asserting that there had been a failure of consideration remained. (Appendix C at Page C-3). The affirmative defense that the Plaintiffs had breached their duty of good faith was among those stricken.

At trial the Plaintiffs were allowed to show that the promissory note was allegedly in default. However, because of the trial court's rulings regarding Service Business' affirmative defenses, Service Business was not allowed to contest the contentions of the Plaintiffs. (See the revelant portions of the Trial Transcript attached hereto as Appendix D). If allowed to do so, Service Busi-

[1] The affirmative defenses that were stricken were included in the Pretrial Order as Defendants' Contentions (31)-(8). Pages C-3 and C-23 evidence that such defenses were removed from the Pretrial Order.

ness would have presented issues demanding consideration by the factfinder, e.g., whether the acceleration of the indebtedness owing under the promissory note was in good faith in light of other pending litigation between the parties and whether the acceleration of the indebtedness owing under the notes was in good faith in light of the Plaintiffs' refusal of Petitioners' tendered payment of the amount that Plaintiffs contend was owing under the note.

The trial court's decision, however, had taken such issues from the province of the jury. As a consequence, the jury returned its verdict against Service Business as to the Plaintiffs' claim and found in favor of the Plaintiffs on Petitioners' counterclaim. (Appendix B at Page B-4).

The Tenth Circuit Court of Appeals affirmed the judgment on August 17, 1989.

REASON FOR GRANTING THE WRIT

Certiorari review is desirable when a Federal Court of Appeals misinterprets state law in a manner likely to create dangerous precedent. *See* Supreme Court Rule 17.1; 13 J. Moore & H. Bendix, *Federal* Practice ¶ 817.25-1[1], at 27 (1988). In the present case, the trial court's ruling and the affirmance by the United States Court of Appeals for the Tenth Circuit to the effect that the good faith requirement inherent in all commercial transactions, and as specifically set forth in Okla. Stat. tit. 12A § 1-208 (1981), does not apply to the acceleration of promissory notes after a technical default creates a dangerous precedent by subjecting the makers of promissory notes to the arbitrary demands of the holders thereof.

With respect to this issue, the Petitioner presents to this Court those rulings of the trial court, affirmed by the United States Court of Appeals for the Tenth Circuit, that create a dangerous precedent regarding the relationship of holders of promissory notes and the makers thereof.

The trial court's ruling that the good faith requirement of Okla. Stat. tit. 12A § 1-208 (1981) does not apply to notes that permit acceleration at the option of the holder upon default by the debtor flies squarely in the face of the express language of the statute and fundamental contract law. The effect of this ruling is that holders of promissory notes now have an unqualified right to accelerate the terms of a promissory note regardless of whether the holders have acted in good faith or with willful and malicious motives.

It is well settled in Oklahoma and other jurisdictions that every party to a contract has an implied duty to perform the contract in good faith. *San Jose Production Credit Ass'n v. Old Republic Life Ins. Co.*, 723 F.2d 700, 703 (9th Cir. 1984); *Rao v. Rao*, 718 F.2d 219, 222 (7th Cir. 1983); *Bain v. Champlin Petroleum*, 692 F.2d 43, 47 (8th Cir. 1982); *C.H. Codding & Sons v. Armour and Co.*, 404 F.2d 1, 8 (10th Cir. 1968). Furthermore, 12A O.S. (1981) § 1-208 specifically requires a good faith belief that the prospect for payment or performance has been impaired before a holder can accelerate the indebtedness owing under a promissory note. Still further, the exercise of the power of acceleration is a harsh remedy and deserves even closer scrutiny than ordinary contractual provisions. *Vaughan v. Crown Plumbing & Sewer Services, Inc.*, 523 S.W.2d 72, 75 (Tex. Civ. App.

1975). Thus, the duty of good faith would apply to the acceleration clause of the promissory note to at least the same extent as it would to any other contract provision. It is interesting to note that the case relied upon by the Tenth Circuit for the proposition that the good faith requirement of Okla. Stat. tit. 12A § 1-208 (1981) does not apply to acceleration in default clauses instead specifically recognizes that the holder of a promissory note must have a good faith belief that the prospect of payment or performance has been impaired. *Knittel v. Security State Bank, Mooreland,* 593 P.2d 92, 97 (Okla. 1979).

Accordingly, in spite of the holdings of the trial court and the summary affirmance by the United States Court of Appeals for the Tenth Circuit, Oklahoma law does require a good faith belief that the prospect of payment or performance is impaired before the holder may accelerate payment of the indebtedness owing under the note. However, because of the trial court's rulings, the Petitioners were not allowed to attack the Plaintiffs' state of mind with respect to their acceleration.

It is clear from the facts that the Plaintiffs could not have had such a belief. With respect to the test of Okla. Stat. tit. 12A § 1-208 (1981), it is interesting to note that the Plaintiffs contend that the 1986 payment on the note was due October 29, 1986. (Appendix B at Page B-3). On or about June 26, 1986, Service Business prepaid to the Plaintiffs a portion of the interest due on the payment that according to the Plaintiffs' interpretation was not due until October 29, 1986. (Appendix B at Page B-3). In spite of this interest prepayment, on or about November 6, 1986, the Plaintiffs at-

tempted to accelerate the terms of the promissory note. (Appendix B at Page B-3). The good faith of the Plaintiffs in exercising the acceleration clause according to their interpretation of the Contract is tarnished when it is recognized that this attempt to accelerate occurred only three days after Laurance B. Wolfberg, the principle owner of Service Business, filed suit against Robert Greenberg in *Wolfberg v. Greenberg*, CIV-86-2441-C in the U.S. District Court for the Western District of Oklahoma. Additionally, approximately two months before the Plaintiffs attempted to accelerate the note, Plaintiff Robert Greenberg, in his capacity as Trustee of the Mal Greenberg Trust, made a serious threat to use his position of Co-Trustee to cause his sister and Wolfberg's wife, Carolyn Wolfberg, to be disinherited. (See the relevant portions of the deposition of Michael Shea attached as Appendix F at F-1). The Petitioners contend that it was not a good faith belief that the prospect for payment or performance had been impaired but rather a retaliatory response to family disputes that prompted the Plaintiffs' acceleration of the indebtedness owing under the note. Such a contention puts the Plaintiffs' state of mind with respect to the acceleration at issue. Issues involving state of mind are reserved for jury consideration. *Pfizer, Inc. v. International Rectifier Corp.*, 538 F.2d 180, 185 (8th Cir. 1976), cert. denied 429 U.S. 1040, 50 L. Ed. 2d 751 (1977). In spite of this, the Petitioners affirmitive defense that the Plaintiffs had breached their duty of good faith by maliciously accelerating the promissory note had been

stricken from the Pretrial Order. Such expunction removed this question from the province of the jury.

Furthermore, Service Business tendered the remainder of the 1986 payment on November 14, 1986, only sixteen (16) days after the Plaintiffs contend that the payment was due. (Appendix B at page B-3). This tender of payment on November 14, 1986, was over a month before the Plaintiffs filed this lawsuit. The 1987 payment was, likewise, tendered in full and was refused by the Plaintiff. (Appendix B at page B-3). From these facts it is evident that at the time the Plaintiffs filed this suit to accelerate the indebtedness allegedly owing under the promissory note there is a question as to whether they had a good faith belief that prospect for payment had been impaired. Again, the Trial Court's rulings on summary judgment precluded these matters from being presented to the jury. Accordingly, this ruling kept any evidence as to Greenberg's motive in accelerating the promissory note from the jury. In this regard, it is noted that, in the absence of the disclaimer, Greenberg retained a direct financial interest in the promissory note as a beneficiary of the Trust.

Also important to this Petition for Certiorari is the fact that the promissory note itself did not provide a date for payment. Consequently, Oklahoma law implies a reasonable time to make a payment. *Oaks v. Motor Insurance Corp.*, 595 P.2d 789, 791 (Okla. 1979); *Nations v. Stone*, 92 Okla. 18, 20, 217 P. 1031, 1033 (1923). The 1986 payment was tendered on November 14, 1986. (Appendix B at page B-3). This was within a reasonable time of any possible due date and yet, the Plaintiffs still commenced this action to accelerate. It is argu-

able whether the Petitioners were in default but in any event the Plaintiffs' conduct in accelerating clearly does not satisfy the burdens imposed by fundamental contract law or Okla. Stat. tit. 12A § 1-208 (1981). There simply could not have been a good faith belief that the prospect of payment or performance had been impaired by the arguably technical default of the Defendants.

Similarly, the promissory note in the present case is ambiguous on its face. It calls for annual payments but makes no provision for the specific date on which such payments are to be made. In spite of this ambiguity, the Petitioners tendered payment within a reasonable time of when the Plaintiffs contend payment was due. This fact also casts doubt on the good faith belief that the prospect for payment or performance had been impaired. It is arguable whether the payment was due because of the ambiguous payment date provision in the note. However, in spite of this ambiguity, the Petitioners tendered payment to Plaintiffs prior to the Plaintiffs' commencement of this action. Again, there simply could not have been good faith belief that the prospect for payment or performance had been impaired when this action to accelerate was commenced.

Finally, assuming arguendo that the note was in default on or about October 29, 1986, it should be noted that the Plaintiffs had a history of accepting late payments. The promissory note was entered into on October 29, 1982. (Appendix B at page B-2). A $5,000.00 principal payment, without any interest, was made and accepted by the Trust on or about March 5, 1985. According to the Plaintiffs' interpretation of due date, this payment in March of 1985 would have been over a year late.

The payment was, however, accepted. A second payment in the amount of $43,231.80 was made on or about June 26, 1986. (Appendix B at page B-3). This payment included payments that were several years late according to the Plaintiffs' arguments. However, this payment was, likewise, accepted by the Trust. The result of this conduct was that the Plaintiffs had waived their right to declare a default, and thereby accelerate. *Westinghouse Credit Corp. v. Shelton,* 645 F.2d 869, 872 (10th Cir. 1981). It should be pointed out that the June 26, 1986, payment also included several thousand dollars of interest on the 1986 payment that, according to the Plaintiffs' interpretation of the contract, was not due until October 29, 1986. (Appendix B at Page B-3).

These transactions clearly indicate that the Plaintiffs had a history of accepting late payments. However, the Plaintiffs' acceleration was an attempt to demand strict compliance with their interpretation of an ambiguous contract. This conduct casts doubt on the good faith of the Plaintiffs. Such doubt as to the good faith of the Plaintiffs should have been resolved by the jury. However, because of the trial court's rulings, the jury was not allowed to hear this evidence and accordingly, returned its verdict against Service Business.

CONCLUSION

The rulings by the trial court and the affirmance by the Tenth Circuit Court of Appeals removed from the province of the jury issues concerning good faith that by well-settled law are reserved for jury resolution. As recognized by the United States Court of Appeals for the Tenth

Circuit's Opinion, the implicit effect of this ruling is that holders of promissory notes are not subject to a duty of good faith with respect to the acceleration clauses of such notes. Such a ruling is squarely at odds with fundamental contract law and the explicit language of the statute that controls this dispute.

Accordingly, Certiorari review is fully justified in the present case. Without intervention by this Court dangerous precedent will be established subjecting the makers of promissory notes to the arbitrary demands of the holders thereof.

Respectfully submitted,

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APPENDIX A

FILED
March 25, 1989
United States District Court
Western District of Oklahoma
Robert D. Dennis, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-86-2769-A

ROBERT I. GREENBERG, ET AL.,
Plaintiffs,

VS.

SERVICE BUSINESS FORMS INDUSTRIES, INC., ET AL.,
Defendants.

JOURNAL ENTRY

On this 16th day of March, 1988, this matter came on for trial before the undersigned Judge of the United States District Court within and for the Western District of Oklahoma. The parties having announced ready for trial, and defendants having made demand for jury trial a jury was empaneled and sworn. Plaintiffs introduced their evidence on their case in chief and defendants, Service Business Forms Industries, Inc., and Service Computer Forms Industries Inc., introduced its evidence and rested. At the close of the defendants' evidence, plaintiffs moved for directed verdict on their claim and the Court, after hearing arguments of counsel, finds a verdict should be directed in favor of plaintiffs and against defen-

dant Service Business Forms Industries, Inc., on the note in question in the amount of $102,417.54, together with interest from and after the date of judgment at 9%, attorney's fees and costs of this action to be subsequently determined by this Court. The Court denied plaintiffs' motion to dismiss defendants' counterclaim. Plaintiffs proceeded to introduce evidence in rebuttal to defendants' counter-claim. At the close of all evidence, plaintiffs renewed their motion to dismiss defendants' counter-claim which motion was denied by the Court, and the single issue as to whether or not defendants had sustained their burden of proof that Robert I. Greenberg, separately agreed to execute a disclaimer to the benefits of the redemption to the stock owned by the Mal Greenberg Testamentary Trust in the amount of $51,000 was submitted to the jury for an advisory verdict. The jury retired to deliberate and returned its verdict in open court in favor of plaintiffs. The verdict was ordered and received by the Court and the jury discharged. The Court now adopts the findings of the jury that the defendants, Service Business Forms Industries, Inc., and Service Computer Forms Industries, Inc., failed to persuade them by a preponderance of the evidence that Robert I. Greenberg agreed to execute a disclaimer of the benefit to him through the Mal Greenberg Testamentary Trust of the redemption of the shares of Service Computer Forms Industries, Inc. and judgment is entered in favor of plaintiffs on defendants' counter-claim.

s/ Wayne E. Alley

The Honorable Wayne E. Alley
United States District Judge

Approved:

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APPENDIX B

FILED
August 17, 1989
United States Court of Appeals
Tenth Circuit
Robert L. Hoecker, Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 88-1636

ROBERT I. GREENBERG; ROSE GREENBERG; MAYNARD GREENBERG, AS CO-TRUSTEES OF THE MAL GREENBERG TESTAMENTARY TRUST,

Plaintiffs-Appellees,

vs.

SERVICE BUSINESS FORMS INDUSTRIES, INC., SERVICE COMPUTER FORMS INDUSTRIES, INC.,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. 86-2769-A)

John T. Edwards (Sarah H. Stuhr with him on the brief) of Monnet, Hayes, Bullis, Thompson & Edwards, Oklahoma City, Oklahoma, for the Plaintiffs-Appellees.

Richard C. Ford (J. Clay Christensen with him on the brief) of Crowe & Dunlevy, Oklahoma City, Oklahoma, for the Defendants-Appellants.

Before LOGAN, BRORBY, and EBEL, Circuit Judges.

PER CURIAM

Service Business Forms Industries, Inc. (Service Business) and Service Computer Forms Industries, Inc. (Service Computer), defendants, appeal the district court's order granting plaintiffs partial summary judgment on their claim for recovery of an accelerated debt allegedly due under Service Business' promissory note. The district court determined that there were no material issues of fact as to Service Business' default under the terms of the promissory note and that plaintiffs properly exercised their right to accelerate the unpaid principal balance and accrued interest. On appeal, defendants contend there are genuine issues of fact regarding each of its defenses.

Plaintiffs are co-trustees of the Mal Greenberg Testamentary Trust (the Trust). On October 29, 1982, plaintiffs entered into a stock redemption agreement with Service Computer, a Nevada corporation presently owned and operated by Carolyn and Laurance Wolfberg. The Wolfbergs are the sister and brother-in-law of Robert Greenberg (Greenberg), a plaintiff and a trustee of the Trust. Under the stock redemption agreement, the Trust transferred all the shares it owned in Service Computer back to the company in exchange for $102,000. Of this amount, $2,000 was to be paid at closing and $100,000 was to be paid pursuant to the promissory note at issue here.

Pursuant to the stock redemption agreement, Service Business, an affiliate of Service Computer which is also operated by the Wolfbergs, executed a $100,000 promissory note on October 29, 1982, the closing date of the stock redemption agreement. The note provided for annual payments to be calculated on a twenty-year amortiza-

tion schedule with full payment to be made on the tenth anniversary of the note's execution. The note further stated that the Trust had the option to accelerate the debt and demand full payment if Service Business defaulted on any of its obligations under the note. The note did not specify a specific due date for the annual payments. In addition to this written agreement, Service Business alleged that Greenberg promised to execute a disclaimer of any interest he had as a beneficiary under the Trust. Greenberg denied that he ever made such an agreement.

By April, 1986, Service Business had made only one payment on the note, in the amount of $5,000. As a result of further negotiation between the parties, Greenberg executed a written disclaimer in favor of Service Computer under which Greenberg disclaimed any interest he might have through inheritance in the family jewelry. The disclaimer was conditioned on Service Business' payment of all past due amounts owing under the promissory note and upon its "timely payment" of all future installments. The disclaimer also failed to designate a specific date for the future annual payments. Thereafter, Service Business paid $43,231.86 on June 26, 1986, which included partial payment of the 1986 installment. On November 6, 1986, not having received the payment from Service Business which they considered due on October 29, 1986, plaintiffs sent Service Business a notice of their intention to accelerate payment of the note. On November 14, 1986, and again on October 29, 1987, Service Business tendered payment of the installment amount owing, calculated

as of the anniversary date of the note. On both occasions, plaintiffs refused to accept the payments.

Plaintiffs brought this action to recover the accelerated amount of the principal and accrued interest under the note. In its answer, defendants raised several defenses, including waiver, estoppel, and lack of default under the terms of the note. Defendants also filed a counterclaim, alleging failure of consideration by virtue of Greenberg's refusal to execute a disclaimer of any interest in the Trust funds. Plaintiffs moved for summary judgment and, after a hearing, the district court granted partial summary judgment in their favor. The court found that the terms of the contract clearly designated the payments to be due on October 29th of each year, by virtue of the date of the note's execution and the fact that annual payments were calculated on the basis of a twenty-year amortization. The court further held that there were no material issues of fact as to waiver, estoppel, or default and found that Business Service had defaulted on its payment obligations, that the Trust had the right to accelerate the balance owing upon default, and that the Trust properly exercised its right to accelerate. The court ruled, however, that there were material issues of fact regarding the issue of whether Service Business received full consideration for the stock redemption agreement with the Trust because Greenberg allegedly failed to issue a disclaimer of any interest as beneficiary under the Trust. This last issue was presented to the jury, which returned a verdict in favor of Greenberg and the Trust.

On appeal, Service Business contends that there are several genuine issues of fact which precluded the granting of partial summary judgment. First, Service Business contends that it did not default on its obligations under the note because the document did not specify a date on which payment was due, and argues under Oklahoma law that payment was thereby due within a reasonable time. We disagree. Oklahoma statute dictates that contracts are to be interpreted according to the intent of the parties at the time the instrument was executed. Okla. Stat. tit. 15, §§ 152, 153 (1981). Intent must be determined by construing the contract as a whole, and the court must construe the contract so as to give effect to each provision. *Amoco Prod. Co. v. Lindley,* 609 P.2d 733, 741 (Okla. 1980). The language of the note setting the date of final payment as October 29, 1992, and the method for calculating the amount of annual payments clearly indicate that the parties' intended that payments were to have been made on the anniversary date of the note.[1]

Second, Service Business asserts that plaintiffs did not accelerate the note in good faith. Service Business claims the duty of good faith arises both under the Uniform Commercial Code (UCC), Okla. Stat. tit. 12A, § 1-208 (1981), and under the common law doctrine of good faith in the performance of a contract. Section 1-208 provides:

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[1] Service Business relies on Okla. Stat. tit. 15, § 173 (1981), which states that the law implies a reasonable time for payment when no date is provided for performance of a contractual obligation. But the law implies a reasonable time for payment only when the contract is ambiguous and the intention of the parties cannot be determined from the express language and terms of the contract. *See id.* § 154; *Lindhorst v. Wright,* 616 P.2d 450, 453 (Okla. App. 1980). Because the terms of the agreement as a whole clearly indicate a time for payment, this rule cannot appropriately be applied to the promissory note at issue in this case.

> A term providing that one party . . . may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

Id.; see also Mitchell v. Ford Motor Credit Co., 688 P.2d 42, 44-45 (Okla. 1984) (acceleration by a secured party). In finding that plaintiffs properly exercised their power of acceleration, the district court implicitly found that the good faith requirement set forth in § 1-208 does not apply to notes that permit acceleration at the option of the holder upon default by the debtor. We agree.

The only Oklahoma case we have located which addresses the question of whether the good faith requirement under the UCC applies to acceleration on default clauses is *Knittel v. Security State Bank, Mooreland, Okla.*, 593 P.2d 92 (Okla. 1979). The case did not directly address the issue; however, it upheld a challenged jury instruction which stated that the good faith requirement under § 1-208 did not apply to an acceleration on default clause. *Id.* at 97. Because a court must determine whether a challenged jury instruction properly states the applicable law, *see Big Horn Coal Co. v. Commonwealth Edison Co.*, 852 F.2d 1259, 1271 (10th Cir. 1988), it logically follows that

Knittel supports the position that the UCC good faith requirement does not apply to acceleration on default clauses.

Several states have similarly held that the UCC good faith requirement is not applicable when the acceleration clause is based on an event in the debtor's complete control. *E.g. Brummund v. First Nat'l Bank,* 99 N.M. 221, 656 P.2d 884, 887 (1983) (relying on North Carolina law); *Bowen v. Danna,* 276 Ark. 528, 637 S.W.2d 560, 564 (1982); *In re Sutton Invs., Inc.,* 46 N.C. App. 654, 266 S.E.2d 686, 690 (1980); *Crockett v. First Fed. Sav. & Loan Ass'n,* 289 N.C. 620, 224 S.E.2d 580, 588 (1976). *But see Brown v. AVEMCO Inv. Corp.,* 603 F.2d 1367, 1375-80 (9th Cir. 1979) (comparing the applicability of UCC § 1-208 on "default" acceleration clauses as opposed to "insecurity" acceleration clauses under Texas law). Because of the ruling on *Knittel* and the general consensus in other jurisdictions, we conclude that Oklahoma would not apply the good faith requirement in § 1-208 to the acceleration on default clause at issue in this case.

Service Business also claims that plaintiffs failed to perform their contract in good faith under common law equitable principles. Service Business relies on *Brown v. AVEMCO Inv. Corp.,* in which the Ninth Circuit applied the common law doctrine of good faith to a due-on-lease clause contained in a security agreement executed in conjunction with a promissory note.[2] 603 F.2d at

[2] Under the security agreement, the creditor, AVEMCO, had the option to accelerate the entire debt if the debtor leased the property, an airplane, without its written consent. In 1973, the debtor leased the airplane to a third party and also executed an option to purchase. The debtor sent notice of the agreement to AVEMCO. Two years later, the lessee exercised its option to purchase and tendered full payment of the remainder owing under the promissory note. AVEMCO, after two years of

1375-79. In reversing a jury verdict in favor of the creditor, the court noted that, under Texas law, acceleration clauses are designed to protect a creditor from conduct or events that jeopardize or impair the creditor's security. *Id.* at 1376. The court held that the jury should have been instructed on the issue of the creditor's good faith in exercising the due-on-lease clause when evidence existed that it inequitably desired to take advantage of a technical default, not because it in good faith feared its security was impaired. *Id.* at 1379. This decision was based on Texas case law which clearly mandated that equitable considerations should be applied when a creditor exercises an optional right to accelerate for the sole purpose of receiving the entire payment rather than for the purpose of protecting its debt. *Id.* We must determine whether Oklahoma would likewise impose an equitable duty on a creditor to not use the power of acceleration when its security is not impaired.

The Oklahoma Supreme Court has ruled on two occasions that an acceleration clause contained in a mortgage will not be enforced where the conduct of the mortgagee has been unconscionable or inequitable. *Continental Fed. Sav. & Loan Ass'n v. Fetter,* 564 P.2d 1013, 1019 (Okla. 1977); *Murphy v. Fox,* 278 P.2d 820, 826 (Okla. 1955). In *Continental,* the court denied a bank's request to accelerate and foreclose on a mortgage based on a due-on-transfer clause when the bank refused to consent to a transfer solely because the

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inaction, refused the tendered payment and instead exercised its option to accelerate under the due-on-lease clause but also demanded an additional sum for the cost of insurance premiums. After the debtor refused to pay the additional amount, AVEMCO repossessed the airplane and sold it for a higher profit. 603 F.2d at 1369.

mortgagor would not pay a substantial transfer fee. The transfer fee was an additional condition unilaterally imposed by the bank and was not contained in the original mortgage agreement. The court held the bank's conduct in demanding additional payment was unconscionable and denied its requested relief. 564 P.2d 1019.

In *Murphy,* the court refused to permit a mortgagee to accelerate the maturity of a promissory note because the court found that the mortgagee had attempted to hinder timely payment by the mortgagor and had encouraged its default. 278 P.2d at 824. The court determined that this conduct was motivated solely by the mortgagee's desire to accelerate the maturity of the entire debt and held that the technical default of tendering late payment of taxes was insufficient to justify acceleration when the mortgagee had acted unconscionably. *Id.* at 826.

According to our reading of these cases, whether the Oklahoma court permits acceleration depends on the conduct of the mortgagee and whether he has dealt fairly with the debtor or has acted oppressively or unconscionably. This view is consistent with that of several other jurisdictions. *See Phipps v. First Fed. Sav. & Loan Ass'n,* 438 N.W.2d 814, 819 (S.D. 1989) (an acceleration clause will be enforced absent fraud, bad faith, or other conduct on part of the mortgagee which would make it unconscionable to enforce the clause); *Key Int'l Mfg., Inc. v. Stillman,* 130 A.D. 475, 480 N.Y.S.2d 528, 530 (1984) (absent some element of fraud, exploitative overreaching or unconscionable conduct by the creditor, the court should enforce an acceleration clause), *aff'd as modified,* 66 N.Y.2d 924, 489 N.E.2d 764, 498

N.Y.S.2d 795 (1985); *Bowen v. Danna*, 637 S.W.2d at 564 (a court in equity can relieve a debtor from the hardship of acceleration based on accident, mistake, fraud, or inequitable conduct of the creditor); *First Fed. Sav. & Loan Ass'n v. Ram*, 135 Ariz. 178, 659 P.2d 1323, 1325 (Ct. App. 1982) (same); *Ciavarelli v. Zimmerman*, 122 Ariz. 143, 593 P.2d 697, 698-99 (Ct. App. 1979) (same).

Nothing in the record warrants an application of these equitable principles in the instant case. Plaintiffs did not exercise their option to accelerate after a considerable delay. *See, e.g., Brown*, 603 F.2d at 1379; *Caspert v. Anderson Apartments, Inc.*, 196 Misc. 555, 94 N.Y.S.2d 521, 526 (Sup. Ct. 1949). Nor did the default concern a technical, secondary obligation such as payment of taxes.[3] Rather, the default violated the essence of the written agreement, timely payment of principal and interest.[4] Finally, no evidence was presented

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[3] In *Murphy*, the court discussed several cases from other jurisdictions which considered a technical default to be a failure to comply with a secondary obligation such as payment of taxes or assessments as opposed to a default on payment of principal or interest. *See* 278 P.2d at 825. Generally, these cases consider a default in payment of a principal or interest payment to be a substantial breach rather than a technical default. *See e.g., Graf v. Hope Bldg. Corp.*, 254 N.Y. 1, 171 N.E. 884, 885-86 (1930).

[4] The court in *Continental Federal Savings & Loan Association v. Fetter* stated:

> [A]cceleration clauses are bargained-for elements of mortgages and notes to protect the mortgagee from risks connected with transfer of the mortgaged property. The underlying rationale for an acceleration clause is to insure that a responsible party is in possession, to protect the mortgagee from unanticipated risks, and to afford the lender the right to be assured of the safety of his security. However, an action to accelerate and foreclose a mortgage is an equitable proceeding, and the equitable powers of the court will not be invoked to impose an extreme penalty on a mortgagor with no showing that he *has violated the substance of the agreement*.

564 P.2d at 1017-18 (footnote omitted) (emphasis added).

that Greenberg attempted to hinder or otherwise cause the default so as to make his conduct unconscionable. [5]Defendants had complete control over the event which triggered plaintiffs' right to accelerate. The mere fact that the plaintiffs' interest might not have been in jeopardy, without some misconduct on the part of the plaintiffs, does not warrant a refusal to enforce an acceleration clause which was a bargained-for element of the contract between the parties. Under the circumstances of this case, we conclude that there are no material issues of fact under the applicable Oklahoma law regarding the enforceability of the acceleration clause and the issue of good faith.

Service Business also asserts that plaintiffs waived their right to accelerate through their prior acceptance of late payments. Ordinarily, prior acceptance of late payments only waives the right to accelerate as to those past installments. *McGowan v. Pasol,* 605 S.W.2d 728, 732 (Tex. Civ. App. 1980). When a creditor establishes a prior course of dealing in accepting late payments, the creditor is estopped from declaring total debt due on future defaults. *Id.* Estoppel does not apply, however, when the obligor gives the debtor notice that the terms of the agreement will be enforced in the future. *Id.; Dunn v. General Equities of Iowa, Ltd.,* 319 N.W.2d 515, 517 (Iowa 1982); *see also Sternberg v. Mason,* 339 So.2d 373, 376 (La. Ct. App. 1976) (waiver rule has no application where obligee made frequent demands for punctual payment or accepted tardy payment as a result of

[5] Any issue as to Greenberg's refusal to provide a disclaimer was conclusively decided by the jury, which decision is not an issue in this appeal.

unwilling or forced indulgence). Because Service Business or its officers received adequate notice by virtue of the disclaimer executed in April, 1986, that the trustees demanded all future payments to be made timely, no material issue of fact exists on the issue of waiver.

Defendants also argue that they did not receive a fair trial on the disclaimer issue because they were not permitted to introduce evidence concerning Greenberg's motivation in accelerating the note. Apparently, the district court refused to allow any evidence concerning the default because the issue had been decided on summary judgment. The question of whether certain evidence is relevant to an issue before the jury is within the sound discretion of the district court. *United States v. Alexander*, 849 F.2d 1293, 1301 (10th Cir. 1988). If Service Business believed evidence regarding Greenberg's motivation was relevant to its claim tried to the jury, it should have made such an objection during trial. Based on the objections contained in the record, we do not believe the trial court abused its discretion in so ruling.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

APPENDIX C

FILED
March 7, 1988
United States District Court
Robert D. Dennis, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-86-2769-A

ROBERT I. GREENBERG, ROSE GREENBERG, AND MAYNARD GREENBERG, AS CO-TRUSTEES OF THE MAL GREENBERG TESTAMENTARY TRUSTS,
Plaintiffs,

VS.

SERVICE BUSINESS FORMS INDUSTRIES, INC., SERVICE COMPUTER FORMS INDUSTRIES, INC.,
Defendants.

FINAL PRETRIAL ORDER

The following is submitted in compliance with Rule 17 of the Rules of the United States District Court for the Western District of Oklahoma.

Date of Trial: March 14, 1988 jury docket.

Appearances: John T. Edwards, of the firm Monnet, Hayes, Bullis, Thompson & Edwards, for plaintiffs. Robert D. McCutcheon and J. Clay Christensen of the firm of Crowe and Dunlevy, P.C. for defendants.

PRELIMINARY STATEMENT

Plaintiffs contend that on or about October 29, 1982, plaintiffs and defendant, Service Computer Forms Industries, Inc. ("Service Computer"), by

and through Laurance B. Wolfberg, Vice President, entered into a stock redemption agreement whereby it agreed to redeem all its stock owned by the Mal Greenberg Testamentary Trust for $102,000. Two Thousand Dollars ($2,000) was paid at closing and Service Business Forms Industries, Inc. ("Service Business"), through Laurance B. Wolfberg, Vice President, executed and delivered a promissory note in the amount of $100,000 to the Mal Greenberg Testamentary Trust for the remaining purchase price. The note called for interest at the rate of 9% per annum with annual payments computed on a 20-year amortization schedule. Full payment of the principal sum plus accrued interest thereon was due 10 years from date of the note. In the event of default on any payment, the unpaid balance of principal and accrued interest became due and payable at the option of the trust. Service Business failed to make its annual installment allegedly due October 29, 1986. On November 6, 1986, plaintiffs advised Service Business and Service Computer that the entire unpaid balance of principal plus accrued interest thereon at 9% per annum was immediately due and payable. Both defendants have and still refuse to pay.

At the time of default, the unpaid balance of the principal on the note was $85,000, plus accrued interest. Plaintiffs contend they are entitled to judgment in the amount of $85,000 plus interest at 9% per annum to date of judgment as provided in the note, plus costs and attorney's fees.

Defendants contend: (1) Service Computer is not a party to the promissory note in question and not a proper party to this action; (2) they tendered

the full 1986 payment on November 12, 1986; (3) (4) (5) (6) (7) and, (8) Robert I. Greenberg breached his agreement to execute the disclaimer, thus, a partial failure of consideration occurred to discharge Service Business from payments on the promissory note. Defendants are entitled to attorney's fees, interest, costs and such other and further relief as the Court deems just and proper for Greenberg's refusal to execute the disclaimer and for the defense of plaintiffs' action against defendants.

Defendants counterclaimed alleging that under the terms of the Mal Greenberg Testamentary Trusts, Robert I. Greenberg is both a beneficiary and a co-trustee. On or about October 25, 1982, to induce Service Computer, Service Business and Laurance Wolfberg into this transaction, Robert I. Greenberg, in either his individual capacity or his capacity as Trustee, represented and agreed to execute a disclaimer of any interest that he may have in the $100,000 plus interest accrued thereon. Greenberg's representations, in either of his capacities, induced the defendants to purchase the stock owned by the Mal Greenberg Testamentary Trust and to execute the promissory note in question. Greenberg, in either capacity, has been requested to execute the disclaimer, but refuses to do so.

Greenberg's refusal constitutes a breach of the October 25, 1982, agreement and defendants have not obtained the benefit of their bargain under the agreement. Service Business and Service Computer have continually made or tendered payments of the installments due under the promissory note and have fully performed their

part of the contract but Greenberg, in either capacity, still refuses to execute and deliver the disclaimer.

Plaintiffs replied to defendants' counterclaim as follows:

1. Deny Robert I. Greenberg agreed to execute a disclaimer for the entire $100,000.

2. Admit Robert I. Greenberg agreed with Laurance Wolfberg individually (not with defendants) to execute a disclaimer for the value of his expectancy in his mother's jewelry in an amount which would be equal to any proceeds he might receive from the sale of the stock as agreed.

3. Robert I. Greenberg has in fact executed a disclaimer.

4. Deny Robert I. Greenberg, in either of his capacities, induced Service Business Forms or Service Computer Forms to purchase the stock owned by the Mal Greenberg Trusts and to execute the promissory note.

5. Deny Greenberg's refusal constitutes a breach of the October 25, 1982, agreement.

II. **STIPULATIONS**

A. All parties are properly before the court;

B. The court has jurisdiction of the parties and of the subject matter, pursuant to 28 U.S.C.A. §1332(a) and 28 U.S.C.A. §1446;

C. All parties have been correctly designated;

D. There is no question as to misjoinder or nonjoinder of parties;

E. Facts:

1. Plaintiffs, Robert I. Greenberg, Rose Greenberg and Maynard Greenberg, are co-trustees of the Mal Greenberg Testamentary Trusts, and citizens of the State of Oklahoma.

2. Defendant, Service Business Forms Industries, Inc. is a corporation incorporated under the laws of the State of Kansas with its principal place of business in Wichita, Kansas.

3. Defendant, Service Computer Forms Industries, Inc., is a corporation incorporated under the laws of the state of Nevada with its principal place of business in Wichita, Kansas.

III. **CONTENTIONS**

A. **Plaintiffs:**

1. On October 29, 1982, plaintiffs and defendants entered into a stock redemption agreement whereby Service Computer agreed to redeem all of its stock owned by the Mal Greenberg Testamentary Trust for $102,000.

2. Under the agreement, $2,000 was paid at closing and Service Business, through its vice president, Laurance B. Wolfberg, executed and delivered a promissory note dated October 29, 1982, in the amount of $100,000 to plaintiffs for the remaining purchase price.

3. Under the terms of the note, Service Business promised to pay to the Trust the sum of $100,000 and interest thereon at the rate of 9% per annum payable in annual payments of principal and interest computed on a 20-year amortization

schedule with full payment of the principal sum plus accrued interest thereon due 10 years from date of the note.

4. In the event of default, the unpaid balance of principal and accrued interest were to become due and payable at the option of the Trust.

5. Service Business failed to make the annual installment due October 29, 1986, and said note is in default.

6. After default, plaintiffs advised Service Business and Service Computer they had elected to accelerate the note and the entire unpaid balance of principal plus accrued interest thereon at 9% per annum was immediately due and payable.

7. Both defendants have and still refuse to pay.

8. At the time of default, the unpaid balance of the principal sum of the note was $85,000.

9. The note provides that Service Business agrees to pay all costs of collection, including a reasonable attorney's fee and costs of all legal proceedings.

10. As of December 21, 1987, the principal due on said note together with accrued interest was $100,340.79.

11. Plaintiffs are entitled to judgment in the amount of $85,000, plus interest at 9% per annum to date of judgment as provided in the note plus costs and attorney's fees.

Greenberg denies the averments of the counterclaim that are inconsistent with the contentions in his complaint, but admits he agreed with Laurance Wolfberg individually to execute a dis-

claimer for his mother's jewelry equal to the value of his expectancy from the proceeds of the sale of stock.

III. DEFENDANTS' CONTENTIONS

A. Defendants' Contentions Regarding The Counterclaims against Plaintiffs

1. Laurence B. Wolfberg ("Wolfberg"), Service Business Forms Industries, Inc. ("Service Business") and Service Computer Forms Industries, Inc. ("Service Computer") agreed to purchase the stock of Service Computer not then owned by Wolfberg. Wolfberg negotiated an agreement in principle with the Plaintiff, Robert I. Greenberg. It was assumed at the time that Greenberg was representing all interests not owned by Wolfberg. After Wolfberg and Greenberg reached an agreement in principle as to price, it was disclosed to Wolfberg that the deal did not include that portion of the stock owned by the Mal Greenberg Testamentary Trusts (the "Trusts").

2. Wolfberg's wife, Carolyn, and also Robert I. Greenberg, were each beneficiaries under the Trusts. In order to acquire this additional minority stock interest, on or about October 25, 1982, Wolfberg, Service Business and Service Computer agreed to purchase the Service Computer stock owned by the Trusts for $102,000. To induce Service Computer, Service Business and Wolfberg into the transaction, and as consideration for the purchase, Plaintiff, Robert I. Greenberg, agreed to execute a

disclaimer of any interest in the benefit of the sale that he might have as a beneficiary of the Trusts in the $102,000 purchase price plus interest accrued thereon.

3. Defendants contend that the representation and agreement by Robert I. Greenberg was a material inducement to the Defendants to purchase the stock owned by the Trusts. Service Business thereupon executed a promissory note in the amount of $100,000 to the Plaintiffs, as trustees of the Trusts, in payment of the purchase price for the stock.

4. Payments on the note have been made or tendered for all amounts possibly due. However, despite requests to execute the disclaimer, Robert I. Greenberg refuses to do so. Accordingly, Defendants contend that Robert I. Greenberg breached his agreement to execute the disclaimer of $102,000 to be paid to the Trusts.

5. Defendants contend that specific performance on the contract should be granted, thus requiring the Trustees of the Mal Greenberg Testamentary Trusts to deliver an executed Disclaimer.

6. In the alternative, Defendants contend that this Court should grant an injunction prohibiting enforcement of said October 29, 1982 note until the Mal Greenberg Testamentary Trusts or Robert I. Greenberg deliver the executed Disclaimer.

B. **Defendants' Contentions Regarding Plaintiffs' Claim.**

1. Defendants incorporate by reference and reassert all contentions listed in Part A of Defendants' Final Contentions.

2. Defendants contend that Service Computer is not a party to the promissory note in question and thus is not a proper party to this action.

3. Plaintiffs demanded payment of the promissory note in question on or about November 6, 1986. Defendants tendered the full 1986 payment on November 12, 1986, however, Plaintiffs refused to accept it and brought this action to collect the alleged balance of the entire note.

4. Due to the circumstances surrounding the acceleration of the promissory note, Defendants contend that Plaintiffs breached their duty of good faith by maliciously accelerating the promissory note in question.

5. Defendants contend that no payment of the promissory note was due on October 29, 1986. Even if a payment was due on or about October 29, 1986, as Plaintiffs allege, Defendants contend that the checks relating to said payment were drawn prior to this time Plaintiffs attempted to accelerate the note and were inadvertently not delivered.

6. Defendants contend that the promissory note has been effectively modified to permit payment within a reasonable time on the basis of a past history of accepting payments in amounts and times different

than the Plaintiffs now say are due under the note. Therefore, Plaintiffs are estopped from accelerating the note under the circumstances of this case.

7. The Plaintiffs are estopped from accelerating on the basis of an alleged two-week delay or have waived their right to accelerate as Plaintiffs have a past history of accepting late payments and/or reduced payments by Service Business.

8. Defendants contend that, while the note recites that "annual payments" are to be made, there is no specific date of payment, and given the history of past forbearance, the full 1986 payment was tendered within a reasonable time (*i.e.*, within two weeks from the time Plaintiffs allege payment was due).

9. Defendants contend that, since Robert I. Greenberg breached his agreement to execute the disclaimer, a partial failure of consideration occurred to discharge Service Business from one-half of the amount of the payments on the promissory note.

10. Defendants contend that they are entitled to attorney fees, interest, costs and such other and further relief as this Court deems just and proper for Robert I. Greenberg's refusal to execute the disclaimer and for the defense of Plaintiff's action against said Defendants.

IV. JURY DEMAND

A jury trial has been demanded.

V. EXHIBITS

A. Plaintiff:

Exhibit Number	Description of Exhibit	Objection	Rule Relied Upon
1	Stock Redemption Agreement dated October 29, 1982.		
2	Promissory Note dated October 29, 1982.		
3	Handwritten note of Robert Greenberg dated October 25, 1982 concerning agreement on the trust stock redemption.		
4	Handwritten note of Laurance Wolfberg dated October 28, 1983.		
5	Letter dated December 31, 1983, from Laurance Wolfberg to Bob Greenberg.		
6	Schedule of interest due from Service Computer Forms to the Mal Greenberg Testamentary Trust (beginning date 10/29/82).		
7	Letter dated March 18, 1986, from Robert B. Milsten to Laurance B. Wolfberg re: demand for payment of note.		
8	Letter dated March 25, 1986, from Robert B. Milsten to Laurance B. Wolfberg re: demand for payment of note.		

Exhibit Number	Description of Exhibit	Objection	Rule Relied Upon
9	Letter dated March 31, 1986, from Michael Shea, attorney for Laurance Wolfberg, re: demand for payment.		
10	Disclaimer dated April 7, 1986 from Robert I. Greenberg.		
11	Handwritten disclaimer from Robert I. Greenberg.		
12	Letter dated April 9, 1986, from Robert B. Milsten to Michael Shea.		
13	Letter dated April 11, 1986, directed to Robert B. Milsten from the office of Michael Shea acknowledging receipt of the Agreement to Disclaim.		
14	Letter dated April 18, 1986, from Michael Shea to Robert B. Milsten.		
15	Letter dated May 6, 1986, from Robert B. Milsten to Michael Shea making final demand for payment of the note.		
16	Copy of Check dated October 28, 1986 in the amount of $9,995.62 from Service Computer Forms to the Mal Greenberg Testamentary Trust.		
17	Letter from James White to John Edwards dated November 12, 1986.		

Exhibit Number	Description of Exhibit	Objection	Rule Relied Upon
18	Letter dated November 19, 1986, from John Edwards to James U. White return the check received from Service Business Forms.		
19	Any exhibit listed or used by defendants.		

B. **Defendants:**

Exhibit Number	Description of Exhibit	Objection	Rule Relied Upon
1	March 31, 1986 letter to Robert B. Milsten from Michael A. Shea.		
2	Check No. 1176 dated June 26, 1986 in the amount of $43,231.86 to the Mal Greenberg Testamentary Trust from Service Computer Forms Industries, Inc.		
3	Check No. 1228 dated October 28, 1986 in the amount of $9,995.62 to the Mal Greenberg Testamentary Trust from Service Computer Forms Industries, Inc.		
4	Calculation sheet regarding past payment history on the note.		
5	Letter dated October 28, 1983 to Robert I. "Bob" Greenberg from Larry Wolfberg.		

Exhibit Number	Description of Exhibit	Objection	Rule Relied Upon
6	Agreement dated October 25, 1982 between Robert Greenberg and Laurance Wolfberg.		
7	Letter dated April 18, 1986 from Michael A. Shea to Robert B. Milsten.		
8	Letter dated November 12, 1986 from James U. White, Jr. to John T. Edwards.		
9	Alpha Management letter dated 1/17/86 to Main Hurdman regarding Griffith note.		
10	The Last Will and Testament of Mal Greenberg.		
11	Mal Greenberg Testamentary Trust 1981 U.S. Tax Return.		
12	Mal Greenberg Testamentary Trust 1982 U.S. Tax Return.		
13	Mal Greenberg Testamentary Trust 1983 U.S. Tax Return.		
14	Mal Greenberg Testamentary Trust 1984 U.S. Tax Return.		
15	Mal Greenberg Testamentary Trust 1985 U.S. Tax Return.		
16	Memo from Rose to Houlik (Main Hurdman) dated 2/7/86 regarding Griffith note.		

Exhibit Number	Description of Exhibit	Objection	Rule Relied Upon
17	April 4, 1986 letter from Steven A. Houlik to Robert Greenberg regarding Griffith note.		
18	Mal Greenberg Testamentary Trust Financial Statement dated May, 1974.		
19	Mal Greenberg Testamentary Trust Financial Statement dated December 31, 1986.		
20	Letter dated October 16, 1987 from Robert D. McCutcheon to John T. Edwards		
21	Letter dated October 27, 1987 from John T. Edwards to Robert D. McCutcheon.		
22	September 1, 1983, $400,000 Promissory Note from Griffith Resources, Inc. to Green Wolf Oil Company.		
23	September 1, 1983, $400,000 Promissory Note from Green Wolf Oil Company to The First National Bank and Trust Company with guaranty of Robert I. Greenberg.		
24	Notice of Dissolution dated December 19, 1984, as to Green Wolf Oil Company.		
25	Letter dated 12/31/1983 from Larry Wolfberg to Bob Greenberg.		

Exhibit Number	Description of Exhibit	Objection	Rule Relied Upon
26	All exhibits listed by Plaintiffs.		

VI. WITNESSES

A. Plaintiffs:

Name	Address	Proposed Testimony
Robert I. Greenberg,	1240 Glenbrook Drive Oklahoma City, OK	Will testify as in his deposition, and in addition will testify concerning the circumstances of the loan in question the disclaimer asserted by Wolfberg in his efforts to collect the note.
Laurance B. Wolfberg,	Honolulu, Hawaii	Will testify as in his deposition, and will further testify concerning negotiations for the purchase of Service Business, agreement of Service Business to purchase the stock of the Mal Greenberg Testamentary Trust, reasons the note has not been said as agreed.
Robert B. Milsten,	500 West Main Oklahoma City, OK	Will testify concerning efforts to collect the note, communications between himself and attorneys for Wolfberg.

Name	Address	Proposed Testimony
M.A. Maloney,	1850 First Place Oklahoma City, OK	Will testify concerning his knowledge of the note and efforts to collect same, together with the amount of interest due.

Any witness listed or called by defendants.

B. **Defendants:**

Name	Address	Proposed Testimony
Laurance B. Wolfberg,	4615 Kahala, Honolulu, Hawaii	Mr. Wolfberg will testify regarding the facts surrounding the claims asserted in plaintiffs' complaint and in defendants' counterclaim. More specifically, Mr. Wolfberg's testimony will be regarding the facts surrounding the execution of the promissory note and the facts surrounding the agreement by Robert I. Greenberg to execute a disclaimer of said funds to be paid into the Trusts. Mr. Wolfberg will also testify as to defendants' attempted payment on the promissory note and plaintiffs' bad faith acceleration of said note.

Name	Address	Proposed Testimony
Carolyn Wolfberg,	4615 Kahala, Honolulu, Hawaii	Mrs. Wolfberg will testify as to the facts surrounding the bad faith acceleration of the payments on the promissory note by plaintiffs and the facts surrounding the execution of the promissory note.
Robert I. Greenberg,	1240 Greenbrook Drive Oklahoma City, OK	Mr. Greenberg will testify as to facts surrounding the acceleration of the payments on the promissory note in question and the facts surrounding his failure to issue a disclaimer as represented.
Rose Greenberg,	6212 Diane Drive Oklahoma City, OK	Mrs. Greenberg will testify as to facts surrounding the execution to the promissory note in question and the facts surrounding the acceleration of the payments on the promissory note in question.

Name	Address	Proposed Testimony
Maynard Greenberg,	3040 Charing Cross Road Oklahoma City, OK	Mr. Greenberg will testify as to the facts surrounding the execution of the promissory note in question and the facts surrounding the acceleration of the payment on the promissory note in question.
Marsha Stern,	1534 Hoaaina Street Honolulu, Hawaii	Mrs. Stern will testify as to the relationship between the plaintiffs and Mr. and Mrs. Wolfberg one of the bases for the bad faith acceleration of the note in question.
Jack Stern,	1534 Hoaaina Street Honolulu, Hawaii	Mr. Stern will testify as to the relationship between the plaintiffs and Mr. and Mrs. Wolfberg one of the bases for the bad faith acceleration of the note in question.

Name	Address	Proposed Testimony
Michael Shea,	P.O. Box 3196 Honolulu, Hawaii	Mr. Shea will testify as to the facts surrounding plaintiffs' collection of the payments on the promissory note in question and the attempted acceleration of said note. Further, Mr. Shea will testify as to the Robert I. Greenberg's relationship with Mr. and Mrs. Wolfberg, stockholders of defendant corporations, as it relates to the attempted acceleration of said promissory note. Mr. Shea will not testify as to any matter which involves an attorney client privilege. Therefore, there is no waiver of said privilege.
Berneitta Hartnett,	815 East 2nd St. Wichita, Kansas	Ms. Hartnett will testify as to the facts surrounding the attempted payment in 1986 of an installment on the promissory note in question.

Name	Address	Proposed Testimony
Lloyd Whitrock,	815 East 2nd Street Wichita, Kansas	Mr. Whitrock will testify as to the facts surrounding the attempted payment in 1986 of an installment on the promissory note in question.
John Harper,	815 East 2nd Street Wichita, Kansas	Mr. Harper will testify as to the facts surrounding the attempted payment in 1986 of an installment on the promissory note in question.
Jack M. Sartin,	6441 N.W. Grand Blvd. Oklahoma City, OK	Mr. Sartin will testify regarding Robert Greenberg's representations in connection with certain tax deductions relating to the loan to Griffith Resources, Inc.
Maurice Maloney,	3505 Rosewood Drive Oklahoma City, OK	Mr. Maloney will testify regarding facts submitted to tax advisors in connection with certain tax deductions relating to a loan to Griffith Resources, Inc. Further, Mr. Maloney will testify regarding the accounting surrounding the Trust and promissory note in question.

Name	Address	Proposed Testimony
Steve Houlik,	401 E. Douglas Wichita, Kansas	**Mr. Houlik will testify regarding Robert Greenberg's representations made in connection with certain tax deductions relating to the loan to Griffith Resources, Inc.**

Defendant incorporates herein all witnesses listed by the Plaintiff.

B. **Plaintiffs:**

VII. **ESTIMATED TRIAL TIME**

1½ Days

VIII. **POSSIBILITY OF SETTLEMENT**

Remote at this time.

All parties approve this order and understand and agree that this order supersedes all pleadings and shall not be amended except by order of this court.

s/ John T. Edwards

JOHN T. EDWARDS
MONET HAYES BULLIS
THOMPSON and EDWARDS
1719 First National Center West
Oklahoma City, Oklahoma 73102
ATTORNEY FOR PLAINTIFF

s/ Robert D. McCutcheon

ROBERT D. McCUTCHEON
J. CLAY CHRISTENSEN

CROWE & DUNLEY
A Professional Corporation
1800 Mid-America Tower
20 North Broadway
Oklahoma City, OK 73102
(405) 235-7700
ATTORNEYS FOR DEFENDANTS

Approved this 7th day of March, 1988, subject to the expunctions on page 3 hereof.

s/ Wayne Alley

UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-86-2769-A

ROBERT I. GREENBERG, ET AL.,
Plaintiffs,

VS.

SERVICE BUSINESS FORMS INDUSTRIES, ET AL.,
Defendants.

REPORTER'S TRANSCRIPT OF
TRIAL PROCEEDINGS
BEGINNING WEDNESDAY, MARCH 16, 1988
UNITED STATES COURTHOUSE
OKLAHOMA CITY, OKLAHOMA

BEFORE: THE HONORABLE WAYNE E. ALLEY,
Judge Presiding
(Sitting With a Jury)

APPEARANCES:

MR. JOHN T. EDWARDS, Attorney at Law, 1719 First National Center West, Oklahoma City, OK 73102, appeared on behalf of the Plaintiffs.

MR. ROBERT D. McCUTCHEON, and MR. J. CLAY CHRISTENSEN, Attorneys at Law, 1800 Mid-America Tower, 20 North Broadway, Oklahoma City, OK 73102, appeared on behalf of the Defendants.

Q Was any formal demand made by the Trustees on Service to accelerate the note at that time?

A No demand was made to accelerate the note.

THE COURT: Will counsel come forward, please.

(THE FOLLOWING PROCEEDINGS WERE HAD AT THE BENCH BETWEEN COURT AND COUNSEL OUTSIDE THE HEARING OF THE JURY:)

THE COURT: Are these questions covered by the ruling on Summary Judgment Motion?

MR. McCUTCHEON: I thought all the non-payment issues were, Your Honor, and they got into them extensively, I think we are entitled to show it wasn't until October the demand was made, for whatever purpose use the Jury wants to make of it.

THE COURT: Well, there's no materiality to it so we will not go into that.

MR. McCUTCHEON: Thank you.

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT IN THE PRESENCE AND HEARING OF THE JURY:)

Q (BY MR. McCUTCHEON) You did indicate in your direct examination, direct testimony, that there was a payment tendered after the demand for acceleration in '86; is that not correct?

A Yes, there was.

Q Do you remember how many days after?

THE COURT: Come forward again, please.

(THE FOLLOWING PROCEEDINGS WERE HAD AT THE BENCH BETWEEN COURT AND COUNSEL OUTSIDE THE HEARING OF THE JURY:)

THE COURT: What are you trying to do?p. 27

MR. McCUTCHEON: Your Honor, I think that since he testified to it on direct they are entitled to know how many days. That's all I'll get into, this is the last question I'll ask, I don't intend to circumvent the Court's ruling.

MR. EDWARDS: I don't believe there is any question that the payment was not tendered timely, just offered the evidence that there was no timely offer of payment, by that time we demanded payment in full. This is made after the —

THE COURT: For example, would the answer to this question provide anything that could legitimately be argued to the Jury at the end of the trial?

MR. McCUTCHEON: I think the purpose for the question is to clear up the testimony of the fact there was a payment tendered and rejected afterwards, and I think that comment could be made to the Jury in argument.

THE COURT: The answer has to do with what remaining issue in the case?

MR. McCUTCHEON: The remaining issue under the Pretrial Order, the part that the Court did not strike, was that we tendered the payment on October 12, 1986, and that was not stricken by you in the Pretrial Order, that's still in the Pretrial Order.

MR. EDWARDS: I think your ruling was the only issue left in the case was the issue of failure of consideration.

THE COURT: The only issue of defense, that's a common issue between the defense and the counterclaim, no, I think on these issues that you're going into. Of course, the Plaintiff has the responsibility to show the circumstances that entitled him to accelerate the note, but those were actually taken care of on the ruling for partial summary judgment and any further inquiry on that, I think, would have to be on appeal rather than this.

MR. McCUTCHEON: All right.

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT IN THE PRESENCE AND HEARING OF THE JURY:)

Q (BY MR. McCUTCHEON) The calculation of $102,417.54 that you made, principal and interest that you made as of today, is that calculation in writing anywhere?

A Yes, it is.

Q It is in writing?

A Have I made a calculation in writing?

Q Yes.

A Yes.

MR. McCUTCHEON: No further questions.

THE COURT: Redirect?

MR. EDWARDS: Plaintiff rests its case-in-chief.

THE COURT: You may step down.

(WITNESS EXCUSED)

APPENDIX E

PROMISSORY NOTE

$100,000 October 29, 1982

For Value Received, the undersigned Maker hereby promises to pay to the order of the MAL GREENBERG TESTAMENTARY TRUST ("Trust") at 1850 City National Bank Okc, OK, or at such place as may be designated in writing, the principal sum of One Hundred Thousand Dollars ($100,000), together with interest thereon from the date hereof, at the rate of nine percent (9%) per annum, in legal tender of the United States of America, as follows:

(a) Annual payments of principal and interest to be computed on a twenty-year amortization of the above principal sum;

(b) The full unpaid balance of the principal sum, plus accrued interest thereon, ten (10) years from the date of the note.

The Maker shall have the right at any time and from time to time to prepay the unpaid principal amount of this note in whole or in part without premium or penalty, but with interest accrued to the date of prepayment.

In the event that Maker shall default in the performance of any obligation under this note, this note shall, at the option of the Trust, immediately become due and payable, without presentment, demand, protest or additional notice of any kind, all of which are hereby expressly waived. In such event, the Trust may proceed to collect the unpaid principal balance of the note, plus accrued interest, from the Maker or Guarantor.

In the event an attorney is retained to enforce or collect this Note or any part thereof, the Maker agrees to pay all costs of collection, including a reasonable attorney's fee and costs of all legal proceedings, which amounts may, at the option of the Trust, be added to the principal sum of this note.

MAKER: SERVICE BUSINESS FORMS INDUSTRIES, INC.

s/Laurance B. Wolfberg
LAURANCE B. WOLFBERG, Vice-President

ATTEST:

s/Carolyn Wolfberg
CAROLYN WOLFBERG, Assistant Secretary

GUARANTOR:

s/Laurance
LAURANCE B. WOLFBERG

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-86-2769-A

ROBERT I. GREENBERG, ET AL.,
Plaintiffs,

VS.

SERVICE BUSINESS FORMS INDUSTRIES, INC., ET AL.,
Defendants.

The telephone deposition of the witness, MICHAEL ALAN SHEA, taken on behalf of the Business Forms Industries, Inc., before S.J. Bailey, a Certified Shorthand Reporter in and for the State of Oklahoma on the 6th day of January, 1988, at the United States Courthouse, before U.S. Magistrate Argo.

p. 5

Did Robert Greenberg make any statements as to his future conduct as the trustee of the Mal Greenberg

p. 6

Testamentary Trust in regard to any of the clients we've mentioned in your deposition?

MR. EDWARDS: I want to object to that question at this time because that question is not in issue in either the case now pending before the United States District Court or in the State Court in the case of Service Business Forms, et al., versus Greenberg.

MR. CHRISTENSEN: I'll note your objection. Go ahead and answer, Mr. Shea.

A. Did — near the end of our conversation we were discussing, I believe, the disclaimer issue and he said that the disclaimer — something to the effect that the disclaimer wouldn't be a problem because he as the trustee planned to cause the Marital Trust and the Residuary Trust to be invaded and paid over over to his mother, the current beneficiary of the trust, and thereby doing away with the trusts so that Carolyn wouldn't have any interest or there wouldn't be any interest in the trust to be disclaimed and thereby allowing his mother to disinherit Carolyn entirely from the trust.

Q. (By Mr. Christensen) How did you view this statement made by Mr. Greenberg?

MR. EDWARDS: We'll object to the question calling for a conclusion on the part of the witness.

And also, in fact, that the witness is not an expert on analysis of the intention of Mr. Greenberg.

p. 7

MR. CHRISTENSEN: I'll note your objection. Go ahead and answer.

A. I was surprised and somewhat shocked because I felt that, unlike the other discussions we had, that was something where he seemed to be using his fiduciary position as trustee in an improper manner in the other negotiations.

Q. (By Mr. Christensen) Did you —

A. Attempting to use his fiduciary position as leverage in the nonfiduciary negotiation.

Q. Did you view his statement as any sort of threat to any of your clients?

MR. EDWARDS: Same objection.

A. I viewed it as a direct threat to Carolyn.

Q. (By Mr. Christensen) What was Mr. Greenberg's tone of voice when he was making this threat?

A. As best as I can recall, it was very, you know, firm, forceful sort of cold kind of statement.

I would say threatening, but that's not a tone of voice.

I viewed it as a threatening statement, but I viewed it as being made very firmly and seriously.

Q. Did this threat by Mr. Greenberg pretty well end the conversation?

MR. EDWARDS: Object to the form of the question.

No. 89-817

In The

Supreme Court of the United States

October Term, 1989

SERVICE BUSINESS FORMS INDUSTRIES, INC. and SERVICE COMPUTER FORMS INDUSTRIES, INC.,

Petitioners,

v.

ROBERT I. GREENBERG, ROSE GREENBERG, and MAYNARD GREENBERG, as Co-Trustees of the Mal Greenberg Testamentary Trust,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. 89-817

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Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

This is an action by the holder against the maker of a promissory note containing a "default type" acceleration clause. The sole question presented for review is whether the trial court and Tenth Circuit Court of Appeals correctly interpreted the Uniform Commercial Code good faith requirement of Okla. Stat. tit. 12A, §1-208 (1981) as not applying to "default type" acceleration clauses.

The Respondents, Robert I. Greenberg, Rose Greenberg and Maynard Greenberg, are Co-Trustees of the Mal Greenberg Testamentary Trust (the Trust). On October 29,

1982, they entered into a Stock Redemption Agreement with the Petitioner, Service Computer Forms Industries, Inc. ("Service Computer") presently owned and operated by Carolyn and Laurance Wolfberg. The Wolfbergs are the sister and brother-in-law of Respondent, Robert I. Greenberg.

The parties agreed that the Trust would transfer all the stock shares it owned in Service Computer back to the company for $102,000, with $2,000 paid at closing and the balance to be evidenced by a promissory note. On October 29, 1982, as part of this Stock Redemption Agreement, Petitioner, Service Business Forms Industries, Inc. ("Service Business") executed the $100,000 promissory note fully set forth in Appendix "A". The note provided for annual payments calculated on a twenty-year amortization schedule, with full payment to be made within ten years of the execution date. A "default type" acceleration clause was contained in the note, as follows:

> " . . . *In the event that maker shall default in the performance of any obligation under this note, this note shall, at the option of the Trust, immediately become due and payable,* without presentment, demand, protest or additional notice of any kind, all of which are hereby expressly waived." (Emphasis added)

After execution of the note, there followed a consistent pattern of default in payments to 1986. As a part of negotiations between the parties, Robert I. Greenberg executed a Disclaimer in favor of Service Computer. Greenberg thereby disclaimed any interest he might have in family jewelry, conditioned on payments by Service Business of all past due amounts owing under the note

and upon its timely payment of future annual installments under the amortization schedule.

Service Business did pay $43,231.86 on June 26, 1986, which included a partial payment of the 1986 installment. However, the October 29, 1986, payment was not received. On November 6, 1986, the Respondents sent Petitioner, Service Business, a notice of their intent to accelerate payment of the note, and this action was commenced by the Respondents (holders) against Petitioners (maker) to collect the unpaid principal and interest due.

The trial court entered summary judgment for the Respondents, holding they had an unqualified right to accelerate the debt owed under the note. As a result, the Petitioners' good faith defense was stricken from the pretrial order. Only one issue was presented to the jury, i.e., whether Service Business received full consideration for the Stock Redemption Agreement with the Trust because Robert I. Greenberg allegedly failed to issue a disclaimer of any interest as beneficiary of the Trust. The jury returned a verdict for Greenberg and the Trust.

Petitioner, Service Business, asserted that Respondents did not accelerate the note in good faith under the Uniform Commercial Code (U.C.C.), Okla. Stat. tit. 12A, §1-208 (1981). In its August 17, 1989, Opinion, affirming the trial court, the Tenth Circuit agreed with the trial court's implicit finding that the good faith requirement of Okla. Stat. tit. 12A, §1-208 (1981) does not apply to notes that permit acceleration at the option of the holder upon default by the maker.

In so ruling, the Tenth Circuit Court of Appeals relied on *Knittel v. Security State Bank, Mooreland, Oklahoma*, 593

P.2d 92, 97 (Okla. 1979). That decision upheld a challenged jury instruction which stated that the Okla. Stat. tit. 12A, §1-208 (1981) good faith requirement did not apply to an acceleration of a default clause. Recognizing under *Big Horn Coal Co. v. Commonwealth Edison Co.*, 852 F.2d 1259, 1271 (10th Cir. 1988), that a court must determine whether a challenged jury instruction properly states the applicable law, the Tenth Circuit stated it logically follows that *Knittel* supports the trial court's ruling. This determination was buttressed by the cited holdings of courts in other states which have concluded the U.C.C. good faith requirement is not applicable when the acceleration is based on an event in the debtors' complete control. *Brummund v. First Nat'l Bank*, 656 P.2d 884, 887 (1983) (relying on North Carolina law); *Bowen v. Danna*, 637 S.W.2d 560, 564 (Ark. 1982); *In Re Sutton Invs., Inc.*, 266 S.E.2d 686, 690 (N.C.App. 1980); *Crockett v. First Fed. Sav. & Loan Ass'n.*, 224 S.E.2d 580, 588 (N.C. 1976).

The United States Supreme Court normally defers to the construction of a state statute given it by lower federal courts, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 106 S.Ct. 2794, 86 L.Ed.2d 394 (1985). The reasons are two-fold: (1) to render unnecessary review of their decisions in this respect, and (2) to reflect a belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective states. See *Court v. Ash*, 422 U.S. 66, 73, n.6, 95 S.Ct. 2080, 2085, n.6, 45 L.Ed.2d 26 (1975); *Bishop v. Wood*, 426 U.S. 341, 345-346, 96 S.Ct. 2074, 2077-2078, 48 L.Ed.2d 684 (1976). Exceptions to the rule exist only where there is "plain error," the lower court's view is "clearly wrong" or "unreasonable." *Brockett*, supra, n. 9. See also Wright,

Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d §4036 (1988).

The Respondents submit the Tenth Circuit's characterization of Okla. Stat. tit. 12A, §1-208 (1981), affirming the trial court, was not plain error, clearly erroneous or unreasonable. Here, the Petitioners could have avoided the condition precedent constituting an event of default by complying with the terms of the note and making payments of principal and interest under the 20-year amortization schedule. They failed to do so.

The right to accelerate under the promissory note was conditioned upon an occurrence of a condition within the control of the debtor. The promissory note between the parties in this case did not provide that the holder (Respondents) could accelerate it "at will" or "when they deemed themselves insecure," so-called "insecurity type" acceleration clauses, which under Okla. Stat. tit. 12A, §1-208 (1981) expressly require good faith. Rather, the promissory note in question provides for acceleration only "in the event that maker shall default in the performance of any obligation under this note," a "default type" acceleration clause.

Under the "default type" clause, there is no need for the protection of the good faith requirement. Moreover, the Uniform Commercial Code implicitly allows a default type acceleration clause, since on default a secured party has the right to repossession of the collateral without judicial intervention; the holder must only enumerate the occasions of default.

Admittedly, as recognized in the Court of Appeals' opinion and cases cited therein, equitable grounds could

prevent a "default type" acceleration of maturity, such as accident, mistake, fraud or inequitable or unconscionable conduct of the creditor/holder. Moreover, as codified in Oklahoma, the U.C.C., Okla. Stat. tit. 12A, §1-103 (1981), expressly preserves principles of equity. However, no evidence was presented that Respondents attempted to cause the default in making the installment payments. The default here involved the substance of the parties' written agreement (the promissory note), and "it is implied in every contract that neither party shall do anything which will destroy or injure the other party's right to receive the fruits of the contract." *C.H. Codding & Sons v. Armour and Company,* 404 F.2d 1 (10th Cir. 1968); *Western Natural Gas Co. v. Cities Service Gas Co.,* 507 P.2d 1235 (Okla. 1972).

CONCLUSION

Clearly, the Petitioners have confused the "default type" acceleration clause in the promissory note made by them to Respondents with the "insecurity type" acceleration clause covered by the Uniform Commercial Code, Okla. Stat. tit. 12A §1-208 (1981), and are, therefore, misinterpreting the good faith requirement of that statute to apply to both types of acceleration clauses. The good faith requirement in Okla. Stat. tit. 12A, §1-208 (1981) expressly applies only to a creditor's option to accelerate "at will" or "when he deems himself insecure" or "in words of similar import," i.e., to clauses that place exclusive control in the creditor over the event that will cause acceleration to occur. The promissory note here does not provide such an option, thereby rendering Okla. Stat. tit.

12A, §1-208 (1981) inapplicable. Nor was any evidence presented requiring prevention of the "default type" acceleration clause under equitable principles.

The Petition for Writ of Certiorari is no more than a rehash of the same arguments the Petitioners have made through two lower federal courts despite repeated rulings against them. This Court should not allow itself to become a forum for Laurance Wolfberg's continuing enmity towards his brother-in-law. Petitioners' assertions concerning motive and state of mind are not relevant when good faith is not an issue under the law. Therefore, this Court should defer to the construction of Okla. Stat. tit. 12A, §1-208 (1981) given it by the lower federal courts construing Oklahoma law.

The Respondents respectfully object to the Petition for Certiorari and request the same be denied.

Respectfully submitted,

MONNET, HAYES, BULLIS,
THOMPSON & EDWARDS

By Gayle Freeman Cook
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Attorneys for Respondents

APPENDIX A

PROMISSORY NOTE

$100,000 October 29, 1982

For Value Received, the undersigned Maker hereby promises to pay to the order of the **MAL GREENBERG TESTAMENTARY TRUST** ("Trust") at 1850 City National Bank Okc, OK, or at such place as may be designated in writing, the principal sum of One Hundred Thousand Dollars ($100,000), together with interest thereon from the date hereof, at the rate of nine percent (9%) per annum, in legal tender of the United States of America, as follows:

(a) Annual payments of principal and interest to be computed on a twenty-year amortization of the above principal sum;

(b) The full unpaid balance of the principal sum, plus accrued interest thereon, ten (10) years from the date of the note.

The Maker shall have the right at any time and from time to time to prepay the unpaid principal amount of this note in whole or in part without premium or penalty, but with interest accrued to the date of prepayment.

In the event that Maker shall default in the performance of any obligation under this note, this note shall, at the option of the Trust, immediately become due and payable, without presentment, demand, protest or additional notice of any kind, all of which are hereby expressly waived. In such event, the Trust may proceed to collect the unpaid principal balance of the note, plus accrued interest, from the Maker or Guarantor.

In the event an attorney is retained to enforce or collect this Note or any part thereof, the Maker agrees to pay all costs of collection, including a reasonable attorney's fee and costs of all legal proceedings, which amounts may, at the option of the Trust, be added to the principal sum of this note.

MAKER: SERVICE BUSINESS FORMS INDUSTRIES, INC.

/s/ Laurance B. Wolfberg
LAURANCE B. WOLFBERG
Vice-President

ATTEST:

/s/ Carolyn Wolfberg
CAROLYN WOLFBERG
Assistant Secretary

GUARANTOR: _____
LAURANCE B. WOLFBERG